Neither Herald nor Fanfare: the Limited Impact of the ECHR Act 2003 on Rights Infrastructure in Ireland

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With neither herald nor fanfare, the European Convention on Human Rights Act 2003 entered into force on 31 December 2003 and so, after decades of discussion, the European Convention on Human Rights had become transposed into Irish law and capable of use—through the prism of the Act—in domestic litigation.

It is well known that the Act has had nothing close to the impact of its close cousin the Human Rights Act 1998 in the United Kingdom.[1] Nor has it attracted the vitriol and political attention directed to that Act.[2] Rather it has slid quietly and somewhat unspectacularly onto the statute books and into the legal system. More than ten years after it came into force it is opportune to ask what, if any, impact the European Convention on Human Rights Act 2003 has actually had in Ireland.

I start by outlining the purpose of the Act and very briefly sketching its core elements and structure. I then assess the extent to which the Act might be said to have succeeded in achieving its core stated purpose: the domestication of the Convention in Ireland. In this respect I argue that the Act has been underwhelming, not only because of its design and content but also because of how it has been used in judicial and political processes.

Having proposed a number of practical reforms that might help to ameliorate some of these weaknesses I close by considering what appears to have been the secondary purpose of the Act: the provision of an equivalence of rights protection between

[1] For a sample of the literature see David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (2011; Cambridge University Press); Tom Allen, *Property and the Human Rights Act 1998* (2005; Hart Publishing); Richard Gordan & Tim Ward, *Judicial Review and the Human Rights Act* (2013; Routledge); Janet Wright, *Tort Law and Human Rights* (2003; Hart Publishing); and, generally, Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law*, 3rd Edition (2010; Routledge).

[2] The future of the Human Rights Act 1998 is very much uncertain. The Conservative Party seems committed to replacing it with something else—possibly a 'UK Bill of Rights'. For comprehensive commentary see Colm O'Cinnéide, *Human Rights and the UK Constitution* (2012; British Academy).

Northern Ireland the Republic of Ireland pursuant to the Good Friday/Belfast Agreement.

1. The Purpose of the ECHR Act 2003

Ireland was an early signatory to the European Convention on Human Rights and, indeed, the first state to accept the jurisdiction of the European Court of Human Rights. In the international sphere Ireland was, then, an enthusiastic member of the Council of Europe: the community of states that accept the applicability of the Convention. Indeed, this remains the case. Within the international sphere Ireland consistently reasserts the importance of the Convention, participates in reform processes, commits resources to the improvement and further institutional development of the Court, and does not have a tendency to protest (or refuse to give effect to) adverse judgments from the Court. The domestic approach to the Convention has, however, been more mixed.

Given Ireland's dualist nature[3] and the status of the Convention as an international treaty, it was to be expected that the impact of the European Convention on Human Rights on domestic law would be somewhat minimal until and unless it was incorporated by means of legislation. So it proved. Although the Convention had some impact in domestic litigation, it was uneven and primarily persuasive and the Convention itself was not sufficient to establish any legal wrongs requiring remediation in domestic law.[4] Of course, there were calls for the Convention to be incorporated and numerous different models presented themselves.[5] In general these proposals for incorporation, although differing in scope and form, were based on the claim that incorporation would further the effective enjoyment of Convention rights by allowing for them to be vindicated at the domestic level without recourse to the European Court of Human Rights in Strasbourg always being necessary. However, none of these calls for incorporation actually crystallised into legal change.

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[3] Article 29.6, *Bunreacht na hÉireann*.
[4] See generally Fiona de Londras & Cliona Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (2010; Roundhall), Chapter 2.
[5] For discussion see ibid, Chapter 1.

In fact it was not until a commitment to incorporation was included in the Good Friday/Belfast Agreement (which included core commitments to equivalence of rights protections)[6] that any firm commitment to give effect to the Convention in domestic law crystallised into action, and even then the Act was not passed until some years after the Agreement itself.

Another important development was the passage in the United Kingdom of the Human Rights Act 1998. As outlined further below, the constitutional structures and incentives for transposing the Convention were significantly different in both jurisdictions, and in Ireland there was no equivalent of *Bringing Rights Home*[7] (in which the Labour Party set out the centrality of human rights to its 1997 Manifesto) or *Rights Brought Home*[8] (published with the Human Rights Bill 1997) to outline the rationale for Convention-related legislation. However, the Explanatory Memorandum to what was then the ECHR Bill 2001 stated that

> The provisions in the Bill will alter the current position fundamentally. It is designed to facilitate the bringing of cases involving alleged breaches of rights under the Convention in Irish courts. In other words, it will make rights under the Convention enforceable in Irish courts, and this means that cases of this type will be able to be processed much more expeditiously than under the present arrangements.[9]

Mention of the Good Friday/Belfast Agreement commitment is also made in the memorandum.[10] This Memorandum outlines that the purpose of the Bill—and subsequently the Act—was to enhance effective enjoyment of Convention rights at the domestic level, with a particular focus on litigation. What was *not* intended was the fundamental reshaping of legal conceptions and understandings of rights such as in the UK. In Ireland, then, the objectives the transposition of the Convention were, understandably, substantially more modest. Ireland already had a well developed body of constitutionally protected rights; the Convention rights to be transposed via the European Convention on Human Rights Act 2003 were to complement, rather than supplement, this. Even bearing that in mind, we cannot assume that the Act was

[6] Chapter 6.
[7] Labour Party Consultation Paper 1996.
[8] White Paper 1997.
[9] Explanatory Memorandum to the European Convention on Human Rights Bill 2001, p. 2.
[10] Ibid, p. 3.

introduced without an intended practical impact and so—taking the Explanatory Memorandum outlined above as a starting point and broadening it out by implication from the structure of the Act itself—we can assume that the purpose of the European Convention on Human Rights Act 2003 was, essentially, the *domestication* of the Convention in Ireland.

2. The Structure of the ECHR Act 2003

The structure of the ECHR Act 2003 owes more than a little to the Human Rights Act 1998 although there are important differences in detail. In a broad sense the Act has three main elements: judicial interpretation, rights-compliant performance of functions, and the Declaration of Incompatibility. In this way the Act involves all of the organs of the state—the judiciary, legislature, executive (in particular in its role within the legislature), and the bureaucracy of the state (such as local government and government departments)—in its scheme.

Section 2 places an obligation on Courts to ensure that statutes and other laws are interpreted in a manner consistent with Ireland's obligations under the Convention to the extent possible. Section 3 creates a performative obligation, requiring bodies undertaking state work[11] to do so in a manner that is compatible with Ireland's Convention-based obligations. Finally, where a statute cannot be interpreted in a manner that makes it Convention compatible and no other remedy is available and appropriate,[12] Irish courts may make a Declaration of Incompatibility under s. 5. Where such a Declaration is made the law in question remains in force[13] and the baton passes to the Oireachtas to decide on whether, and if so how, to remedy the inconsistency that has been identified.

It is quite clear that these provisions are supposed to relate to one another; to act in concert in order to maximise the effective domestication of the Convention and, as a

[11] The phrase used in the Act is "organs of the state" which is defined in s. 1: "'organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised".
[12] Section 5(1), European Convention on Human Rights Act 2003.
[13] Section 5(2), European Convention on Human Rights Act 2003.

result, effective enjoyment at domestic level of rights emanating from that instrument. So the scheme of the Act suggests that, in going about their work, organs of the state should ensure that (inasmuch as possible) they interpret relevant legal frameworks in a manner compliant with the Convention and act accordingly; people who consider that their rights are not being upheld can challenge that through litigation in the course of which the Court ought to interpret the law in accordance with the Convention (again inasmuch as possible) and give effect to it accordingly. If the statute in question cannot be interpreted in a Convention-compliant manner and no other appropriate remedy is available a Declaration of Incompatibility ought to be issued by a Court and subsequently laid before the Dáil leading, ideally, to parliamentary discussion as to whether (and if so how) to amend the law in order to achieve Convention compliance. On the face of it, then, the Act creates a multi-party scheme to secure Convention rights domestically.

3. The ECHR Act 2003 and 'Domestication' of the Convention

The Explanatory Memorandum cited above suggests that, in terms of domestication, the ECHR Act 2003 was firmly focused on litigation, but the inclusion of the performative obligation in s. 3 and the Declaration of Incompatibility in s. 5 lend domestication a broader sense inasmuch they suggest that the Convention was not only to be used as an interpretive tool in litigation, but rather to inform everyday practice by all entities acting in some way on behalf of or under the authority of the state. Broadly understood there are four ways in which the Act seems to foresee the domestication of the Convention: interpretation, performance, development of an autonomous understanding of the Convention within Irish legal practice, and political practice. We can assess how successful it has been under each of those headings.

i. Interpretation

Section 2(1) of the ECHR Act 2003 provides

> In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such

> interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

This interpretive provision is the main way in which the Convention standards are to be effectively folded into domestic law. A step up from the pre-existent presumption of compliance with the Convention that had long influenced statutory interpretation in Ireland,[14] s. 2 places a statutory *obligation* on Courts to find a Convention-compatible interpretation of statute and common law to the extent possible. This seems like a sensible approach to domestication, and indeed it is very similar to the approach taken in the United Kingdom[15] which has been central to developing a practice of expansive interpretation of statute in order to ensure Convention-compliance where possible.[16] In Ireland, however, s. 2 seems not have shown its teeth.

In her contribution to this volume, Cliona Kelly notes that s. 2 suffers from poor drafting, sometimes inaccurate deployment by litigants, and a restrictive interpretation by the Courts.[17] The latter of these is especially interesting here, because it arguably arises *alongside* rather than *because of* the former two (well made) observations; it is, as Kelly puts it, a matter of how courts 'frame' the task of interpretation rather than of legislative design *per se*.[18]

In the first place, although the Act requires all laws to be interpreted in a manner that is Convention-compatible to the extent possible, the approach of the Irish courts has tended to be to apply 'ordinary' rules of interpretation first, and s. 2 later, with the first—non-Convention-cognisant—interpretation being considered the "proper"[19] or "correct"[20] one. As Kelly outlines in her chapter, this clearly limits the transformative potential of s. 2, as the antecedent interpretation is presumptively correct setting the

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[14] See, for example, *O'Domhnaill v Merrick* [1984] IR 151.
[15] Section 3, Human Rights Act 1998.
[16] See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009; Cambridge University Press) and Aileen Kavanagh, "The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24(2) *Oxford Journal of Legal Studies* 259.
[17] C. Kelly, please cross ref to final title for chapter in this volume
[18] Ibid.
[19] *Donegan v Dublin City Council & Others* [2012] 2 I.L.R.M. 233, para 96.
[20] *Dublin City Council v Gallagher* Unreported, High Court, 11 November 2008.

bar for acceptance of an alternative, Convention-compliant interpretation very high indeed.[21]

One might expect that this is especially so in situations where an acceptance of such an alternative, Convention-compliant interpretation *effectively* requires words to be 'read into' the statute in question; an exercise that Courts are understandably somewhat reluctant to engage in. That reluctance ought not to be attributed to an aversion to rights, or to Convention rights more specifically, but rather to an acute awareness of the limits of judicial competence. Although s. 2 licences such interpretation—or at least appears to—it also limits it by both possibility and "the rules of law relating to such interpretation and application". Where the limit of judicial interpretive possibility lies is always, and perhaps inevitably, a matter of controversy and in leaving it to the Courts to decide on its location s. 2 is unhelpfully vague. However, it is also important to acknowledge that s. 2 can be read in a licensing rather than a limiting manner, and an interpretation of any particular provision that is considered to go *beyond* judicial interpretation and wander into the realm of judicial law-making can always be 'remedied' by an amending Act of the Oireachtas.

So far, however, s. 2 has not led to a wholesale rejuvenation of the statute book to resolve those (admittedly seemingly limited) situations in which the current legislative position is constitutionally-acceptable but contravenes the Convention. This is not because such an interpretation is not *possibl*e: contrast, for example, the decision of the UK Supreme Court in *Pinnock*[22] reading discretion into the provision for expedited removal from public housing following a long dialogue between London and Strasbourg on the issue,[23] with the issuance of Declarations of Incompatibility rather than interpretations upwards in respect of equivalent provisions in Ireland.[24]

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[21] Kelly, above n. 17.
[22] *Manchester City Council v Pinnock* [2010] UKSC 45
[23] The relevant UK authorities include *Qazi v Harrow LBC* [2004] 1 AC 983, *Kay v Lambeth LBC* [2006] 2 AC 465, and *Doherty v Birmingham CC* [2009] 1 AC 367. The relevant ECtHR authorities include *Connors v United Kingdom* (2005) 40 EHRR 189, *McCann v United Kingdom* [2008] ECHR 385, and *Kay v United Kingdom* [2010] ECHR 1322.
[24] The relevant provision is s. 62, Housing Act 1966 (as amended) in respect of which numerous Declarations of Incompatibility have been issued.

ii. Performance

As mentioned above, one of the elements of the European Convention on Human Rights Act is a performative obligation contained in section 3(1), which provides:

> Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

This provision contains within it a clear tension: on the one hand all organs of the State are required to perform their functions in a Convention-compliant manner, but on the other that obligation is subject to statutory provisions so that an incompatible statutory provision is to be executed *even if* it is incompatible with the Convention and where it has not been interpreted into Convention compliance by a Court. We have already seen how challenging it is to get a provision interpreted up into Convention compliance under s. 2, but if we leave that to one side and imagine the position of an organ of state in respect of the s. 3(1) obligation a number of particular questions arise in respect of the effective domestication that this performative obligation might bring about.

The clear implication of s. 3(1) is that *in the absence of a judicial interpretation* all entities that fall within the definition of "organ of state" ought to consider their statutory obligations, consider their compliance with the Convention, and then decide whether any changes in practice are required. This, of course, would be an enormous undertaking and the logistical and resource implications cannot be understated, however such labour seems part and parcel of expressly imposing such a performative obligation on these entities.

There is however little evidence that this has been done within the relevant organs of state in Ireland. Although some training has been provided under the auspices of organisations such as the Irish Human Rights Commission, it is not at all clear that this kind of systemic review and reform of practice has been resourced or engaged in. In some ways this is, perhaps, unsurprising. Firstly we must note that the introduction of the European Convention on Human Rights Act 2003 did not bring with it anything

like the amount of resourcing, training and education that the introduction of the Human Rights Act 1998 did in the United Kingdom.

This is partially explicable by the fact that organs of the state in Ireland were already accustomed to operating within legal boundaries defined by rights inasmuch as they acted in accordance with the Constitution, but it is nevertheless worth mentioning. A second important factor is that there are actually very few incentives (beyond a desire to act in compliance with the Act) to state organs to take this kind of initiative built into the act: the performative obligation is expressly made "subject to any statutory provision" other than the 2003 Act, so that it is a defence to be acting in pursuance of a statutory provision. Certainly, a relevant statute may be 'interpreted up' to make it Convention-compliant, but as we have seen above that is rarely the case in Ireland, so that the 'normal' interpretation of the statute is likely to persist and organs of state can simply continue to act as they did before the Act was introduced.

If the statute in question is considered to be incapable of a Convention-compliant interpretation under s. 2 a Declaration of Incompatibility may be issued under s. 5 but the legislation in question, of course, remains in force[25] until and unless it is amended by the Oireachtas so that organs of the state must continue to apply it. Even more distincentivising, individuals in relation to whom it is applied must make fresh applications and seek *further* Declarations of Incompatibility if they want to obstruct the operation of the relevant statute upon them.

Organs of state are thus simultaneously placed under a performative obligation and effectively released by said obligation by the construction of the statutory provision itself: a situation that is hardly conducive to substantive change in practice.

iii. Developing an Autonomous Understanding of the Convention

One of the key challenges in the domestication of any international instrument lies in developing an autonomous domestic understanding of the standards that the instrument contains, without undermining or undoing the work of the treaty-

[25] Section 5(2), European Convention on Human Rights Act 2003.

enforcement mechanisms themselves. Developing such an understanding is not inconsistent with the idea of an international instrument; indeed, it is arguably central to such an instrument's healthy evolution not only because it entrenches standards at the domestic level but also because it aids in the management of treaty mechanisms' workload. In the context of the European Convention on Human Rights it is quite clear that the Court wishes to see domestic legal systems develop their own systems around the Convention *subject to* an acceptance that the ultimate interpretative power in respect of the Convention rests with the Court, and that the standards as it outlines them are the minimum common standards to be applied across the Council of Europe.[26]

The wording of the European Convention on Human Rights Act 2003 suggests that it was not beyond the contemplation of the drafters that the Irish judiciary might develop its own understandings of the Convention's meaning within the context of the Act. While the courts are instructed to take account of Strasbourg jurisprudence,[27] they are expressly not bound by that jurisprudence. This leaves scope—at least on a literal reading—for the development of Convention standards as contained within the Schedule to the Act in their domestic setting. It even suggests that Irish courts might be entitled as a matter of domestic law to depart from Strasbourg jurisprudence in order to give effect to what might be considered a 'lower' level of protection than the European Court of Human Rights has declared.

In this, the Act clearly shadows the equivalent provision in the Human Rights Act 1998.[28] In both the UK and Ireland, however, there has to date been somewhat of a reluctance to fully embrace this jurisdiction, with courts in the UK instead taking what has come to be termed as the 'mirror principle' approach and Irish courts seeming to follow suit.

[26] On the relationship see, for example, Fiona de Londras, "International Human Rights Law and Constitutional Rights: In Favour of Synergy" (2009) 9(2) *International Review of Constitutionalism* 307.
[27] Section, 4, European Convention on Human Rights Act 2003.
[28] Section 2, Human Rights Act 1998.

This approach, which is often traced back to Lord Bingham's speech in *Ullah*,[29] suggests that the Convention-based rights in the Human Rights Act 1998 ought to be interpreted in a manner that 'mirrors' the Strasbourg Court's interpretation of the relevant Article. This has so far been developed in a way that suggests that the UK courts will only exceptionally depart 'downwards' from a decision of the Strasbourg Court and will usually follow the Strasbourg jurisprudence. However, in the UK the status of the mirror principle is now in serious question.

As Roger Masterman has written, more and more 'exceptions' in which a departure from Strasbourg is permitted are being developed,[30] and indeed there are (albeit rare) cases in which domestic courts are going *beyond* Strasbourg and prepared to develop the rights protected under the Human Rights Act 1998 to a greater degree.[31] On a straightforward reading of the Human Rights Act 1998 this seems entirely reasonable and, indeed, appropriate. Such an approach does of course attract some criticism, much (although not all) of which can be traced in some ways back to the relatively limited traditional role of the judiciary in the United Kingdom. The Irish judiciary has not traditionally been so limited.

As is well known, the separation of powers has been institutionally entrenched in Ireland since *Bunreacht na hÉireann* and we are quite accustomed to courts holding substantial interpretive powers. Thus, the same socio-cultural reasons for acting as if bound by a mirror principle arguably do not arise in Ireland as do in the United Kingdom. Notwithstanding that, however, Irish courts have embraced the *Ullah* principle in a fairly whole-hearted way and seem extremely reluctant to develop an autonomous meaning of Convention rights as protected by the European Convention on Human Rights Act 2003 that depart from the Strasbourg jurisprudence.

Although not bound by the European Court of Human Rights' jurisprudence as a matter of law, there are hints that Irish courts might consider themselves to be *effectively limited* by that jurisprudence. The strongest indication of this undoubtedly

[29] *R. v Special Adjudicator, Ex p. Ullah* [2004] UKHL 26
[30] Roger Masterman, "The Mirror Crack'd" *UK Const. L. Blog* (13th February 2013) (available at http://ukconstitutionallaw.org); see also Roger Masterman, "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act 1998" (2005) 54(4) *International and Comparative Law Quarterly* 907
[31] See for example *Re P* [2008] UKHL 38.

arises in *McD v L*.[32] Although the attempt in this case to plead the Convention as if it were directly applicable, rather than clearly through the prism of the European Convention on Human Rights Act 2003, was problematic it is worthwhile noticing the clear implication (made express in the judgment of Fennelly J.) that the Court could not outpace Strasbourg in interpreting the Convention.[33] Such a position unnecessarily holds Irish courts back and, by extension, limits the flourishing of the European Convention on Human Rights Act 2003.

There is nothing whatsoever in the terms of the 2003 Act or, indeed, in the Convention that suggests that the *domestic* understanding of the Convention cannot go beyond the Strasbourg interpretation; indeed, the margin of appreciation arguably militates against such a limited vision of the role of domestic courts. We are accustomed to speaking of the margin of appreciation as allowing member states to limit the enjoyment of rights or to take a more restrictive approach than, perhaps, the Convention might accommodate or other European states might favour but of course the margin is not uniquely negative. It exists, rather, to acknowledge legitimate differences across member states (subject, always, to giving effect to a common minimum standard).

iv. Political Practice

Successful integration of the Convention in domestic rights-related discourses requires it to become woven into political practice so that it becomes a relevant talking point—whether invoked in a positive way or not—in domestic legislative and policy debates. Although the Convention suffers from some notably bad press in that jurisdiction, the United Kingdom has designed up a system—through its Human Rights Act 1998 and subsequent practice—in which the Convention is an almost unavoidable element of rights-related public discourse whether in parliament, in the Joint Committee on Human Rights, or in the media. This is partially explicable by the fact that, through the prism of the Human Rights Act, the Convention effectively provides the basis for rights-based protections in the UK. The same is not, of course, true of Ireland where the Constitution provides that basic floor of protection.

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[32] [2009] IESC 81.
[33] *McD v L* [2009] IESC 81 at paras 104–105.

Even bearing that in mind, however, one could hardly claim that the European Convention on Human Rights Act 2003 had mainstreamed the Convention in contemporary political processes. First, there is no requirement to certify that a proposed Bill is compliant with the Convention (unlike in the Human Rights Act 1998[34]). Furthermore, while there is now some pre-legislative scrutiny within the Oireachtas, committees remain divided by area or specialism and there is no dedicated committee for rights-related pre- and post-legislative scrutiny comparable to the Joint Committee on Human Rights. Finally, Declarations of Incompatibility—designed to empower parliamentary debate around rights in what has become known as a model of 'commonwealth constitutionalism'[35] and transplanted from the Human Rights Act 1998—are ill-designed for this jurisdiction and have been distinctly underwhelming in their effects.[36]

This is not to say that the Convention does not play a part in parliamentary debate, but it is difficult to see how this role has significantly advanced from that which it always played, i.e. as either a tangential consideration or the primary nudge (by means of an adverse judgment in respect of Ireland) for substantive and responsive legal change.

At the political level, it is frankly difficult to clearly identify what difference the European Convention on Human Rights Act 2003 has made to effective rights protection.

4. The ECHR Act 2003: Ambitions Fulfilled?

From what I have already written in this short essay, it should be clear that I do not consider the European Convention on Human Rights Act 2003 to be a resounding success (or anything like it) when it comes to the domestic enjoyment of rights that emanate from the European Convention on Human Rights. This is not to say that there is no potential for the Act to be more successful in the future. Indeed, one can

[34] Section 19, Human Rights Act 1998.
[35] See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013; Cambridge University Press).
[36] Discussed at greater length in Fiona de Londras, "Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?" (2014) 35(1) *Statute Law Review* 50.

imagine a number of relatively straight-forward changes that might have significant impact.

First, at the structural level, the relatively recent commitment to pre-legislative scrutiny should be further developed to include a standard pre-legislative scrutiny of Bills for compliance with the Convention taking into account not only Ireland's international commitments but also the commitment—implicit within the Act—that legislation would be given effect in a manner that is Convention-compliant to the extent possible. The primary responsibility for ensuring that legislation is compliant with the ECHR clearly lies with the political branches of government: the Executive and the Legislature. A discussion as to that compliance should, therefore, self-evidently take place within the deliberative political process including during pre-legislative scrutiny when a collaborative process between parliamentarians, government ministers, the office of the Attorney General, and those who contribute to consultations (including academics and practitioners and the Irish Human Rights Commission) can fully air Convention-related matters. This does not require any amendment to the Act, although a requirement that the relevant Minister expressly state whether or not the proposed legislation complies with the Convention would be welcome.[37] Instead, it requires a change in political practice alongside and as part of a change in political mindset. The current period of substantial political reform—including especially in relation to the role and scope of Oireachtas committees—would seem an opportune time to introduce such change.

A further reform at the political level relates to the practice around Declarations of Incompatibility. These Declarations are, as I have written both above and elsewhere,[38] designed precisely to instigate contestation around rights. They do not require legislative reform in order to ensure Convention-compliance, but they *do* require a discussion around the desirability or otherwise of such reform. Where the state continues to apply legislation that has been the subject of a Declaration of Incompatibility that should result from a rigorous and concerted debate at the political level about whether or not maintaining the *status quo* is desirable. However, at present Declarations of Incompatibility (while relatively rare) have not attracted the

[37] Fiona de Londras & Cliona Kelly, above n. 4, Chapter 9.
[38] Fiona de Londras, above n. 36.

level of political attention and political pressure that their structure and rationale suggests they ought to. Changing this is a matter of political commitment. The Declaration of Incompatibility fits awkwardly within a legal constitutionalist system such as Ireland's, but this does not mean that it cannot be an effective instrument provided appropriate political commitment is present.

Moving beyond political structures, organs of the state ought to undertake comprehensive reviews of their compliance with the Convention by reference to s. 3. This requires two stages. The first is the accurate identification of organs of state to which s. 3 applies. As Cliona Kelly and I have previously argued,[39] a literal interpretation of the European Convention on Human Rights Act 2003 suggests that the category of "organ of state" is remarkably broad and may in fact capture a large number of organisations and institutions that do not consider themselves as 'state' entities in quotidian terms. The second stage would be a substantive review by which the organs of state assess, to the best of their judgement, the extent to which they are currently interpreting statutes and adjust their processes and procedures accordingly. Of course, this would be a resource-intensive exercise and it may be that the burden could be shared across agencies and institutions, however it seems unlikely that the performative obligation under s. 3 will be meaningful without such a review.

Finally, a more robust approach to the European Convention on Human Rights Act 2003 by Irish courts would be welcome both in terms of a "re-framing" of the interpretive process under s. 2 (to borrow Kelly's phrase[40]) and a willingness to develop an autonomous understanding of the rights protected through the prism of the Act and emanating from the Convention. As outlined above, such robustness is not only permitted but arguably foreseen by the Act and may also invigorate the political engagement with the Convention and the Act by instigating effective dialogue in this respect between the judiciary, the Oireachtas and the Executive.

5. Equivalence with Northern Ireland

[39] Fiona de Londras & Cliona Kelly, above n. 4, p.p. 106-116.
[40] See Cliona Kelly, above n. 17.

As mentioned in the early stages of this essay, commitments on human rights were a core part of the Good Friday/Belfast Agreement. These included not only substantive commitments to respect and vindicate rights by both governments and in Northern Ireland, but also institutional commitments to establish national human rights institutions and explore further rights instruments such as the controversy-laden Northern Irish Bill of Rights and seemingly-forgotten Charter of Rights for the Island of Ireland.[41]

The United Kingdom was well on the way to incorporating the Convention by the time that the Agreement was concluded; indeed, as noted above, doing so had been a central plank of New Labour's vision for the United Kingdom. The commitment contained in the Good Friday Agreement in that respect was, then, a restatement of pre-existing political will as well as an assurance of kinds that devolution would not detrimentally effect the application of the Human Rights Act 1998 in Northern Ireland. The decision to incorporate in the United Kingdom was part of a comprehensive system of constitutional reform that included but was not limited to devolution, the establishment of the UK Supreme Court, reform of the House of Lords *and* empowerment of the judicial branch in respect of individual rights all of which substantially shifted the contours of (or, some argue, undid the character of) the United Kingdom's political constitution.[42]

The constitutional format and status of rights in Ireland was not comparable to that in the United Kingdom at the time. Since 1937 there had been a constitutionally entrenched protection of fundamental rights, an independent judiciary with a strike down power, and a robust—if imperfect—political engagement with rights as domestic legal instruments. The same incentives for incorporating the Convention did not, then, exist in Ireland as did in the United Kingdom, but Ireland nevertheless committed to equivalence in rights protection in Chapter 6 of the Agreement. It may be that this, ultimately, provided the incentive for transposition of the Convention in

[41] Chapter 6, Good Friday/Belfast Agreement.

[42] For an overview of such constitutional reform see, for example, Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2011; Cambridge University Press), Roger Masterman, "Juridification, sovereignty and separation of powers" (2009) 62(3) *Parliamentary Affairs* 499; and Roger Masterman, "Labour's 'Juridification' of the Constitution" (2009) 62(3) *Parliamentary Affairs* 476

Ireland and explains the close relationship between the Human Rights Act 1998 and the European Convention on Human Rights Act 2003. If that is the case, a somewhat cynical (or perhaps merely realistic) reading of the introduction of the 2003 Act is that its purpose was, merely, to create formal equivalence between the two jurisdictions on the island of Ireland.

Following the introduction of the Act both jurisdictions had a statutorily framed transposition of the Convention that incorporated interpretive (judicial), performative (public authority (s. 6, Human Rights Act 1998)/organs of state), and political elements. As long as that basic framework remains in place, and regardless of the *effectiveness* of the 2003 Act in actually protecting individual rights emanating from the Convention, it may be that in a minimalistic sense the European Convention on Human Rights Act 2003 has fulfilled its function and equivalence is established.

Of course, delving beneath that superficial reading one discovers a host of in-equivalences. Irish judges' colleagues on the benches of Northern Ireland (not to mention the Northern Irish judge in the UK Supreme Court) can hardly feel that their engagement with the Convention is *equivalent* to that of judges in the Republic; nor are local authorities in Northern Ireland likely to recognise as equivalent the extent to which their counterparts in the Republic have had their ways of working transformed (or not) by the performative obligation. Not even politicians can consider that the impact of the Acts has been equivalent, particularly bearing in mind the fact that devolved legislation *can* be struck down for incompatibility under the Human Rights Act 1998.

Assessed by reference to both the domestication of the Convention and the achievement of equivalence with Northern Ireland, it is difficult to tell a particularly optimistic story of the effectiveness of the European Convention on Human Rights Act 2003. Introduced with neither herald nor fanfare, the Act's impact has been limited, but its potential is not. The next decade of its operation may yet bring a deeper entrenchment and fuller embrace of the Act.